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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1985

NANNIE CLARK, *Petitioner,*

vs.

INDIANA DEPARTMENT OF PUBLIC WELFARE and THE DIRECTOR OF THE INDIANA DEPARTMENT OF PUBLIC WELFARE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

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QUESTION PRESENTED

Whether a plaintiff seeking relief under 42 U.S.C. §1983 in state court can be required to exhaust the state administrative remedies contained in the state tort claims act before filing suit?

PARTIES

Petitioner in this Court is Nannie Clark, who was the plaintiff in the proceeding below. Respondents are the Indiana Department of Public Welfare and the Director of the Indiana Department of Public Welfare. At the time petitioner initially filed suit, Robert Smith was the Acting Director of the Indiana Department of Public Welfare.

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INDIANA DEPARTMENT OF PUBLIC WELFARE
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INDIANA DEPARTMENT OF PUBLIC WELFARE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

The petitioner, Nannie Clark, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Court of Appeals, First District, entered in the above-entitled proceeding on May 30, 1985.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals, First District, reported at 478 N.E.2d 699, appears in the Appendix at A-1. The Indiana Supreme Court denied petitioner's Petition for Transfer, without opinion, three votes to two, on December 20, 1985.

JURISDICTION

The Indiana Court of Appeals entered its decision on May 30, 1985. A timely petition for transfer was denied by the Indiana Supreme Court on December 20, 1985, thereby terminating petitioner's right to review in the Indiana court system. On March 4, 1986, Justice Stevens extended the time within which to file this petition for certiorari to April 19, 1986.

The jurisdiction of this Court to review the judgment of the Indiana Court of Appeals is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Indiana Tort Claims Act is found at Ind. Code §34-4-16.5-1—19 (1985), pertinent parts of which are set out in the Appendix at A-11.

STATEMENT OF THE CASE

Petitioner Clark is an elderly, disabled Medicaid recipient. In November, 1980, she requested the welfare department to approve payment under the Medicaid program for dentures to replace her missing teeth. Her request was denied. Clark pursued the administrative remedies established by the welfare department. She requested an administrative hearing within thirty days of the effective date of the denial, as required by 470 Ind. Admin. Code §2-1-11. The denial of payment for dentures

was sustained, following a hearing before an officer appointed by the state department of public welfare. Clark then requested review of the denial by the State Board of Public Welfare. The Board also sustained the refusal to pay for dentures. On August 24, 1981, Smith, the acting director of the welfare department, issued Clark a notice of final agency action in which he notified her that the Board had sustained the denial of payment for dentures.

On September 9, 1981, Clark filed an action in an Indiana Superior Court against two defendants, the state welfare department and its acting director, Smith. The first count of Clark's complaint was a petition for judicial review of the agency's decision under the Indiana Administrative Adjudication Act (AAA), Ind. Code § 4-22-1-1—30.[1] The second count was a complaint for damages and declaratory and injunctive relief under 42 U.S.C. §1983.[2] Clark alleged that by denying her approval for dentures, the welfare department was violating her rights under the United States Constitution and the federal Medicaid statute. Although Clark had pursued the administrative remedies established by the welfare department prior to filing suit, she did not pursue the additional remedies established under the Indiana Tort Claims Act, Indiana Code §34-4-16.5-1—19.[3]

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[1] Indiana case law requires claimants to join their §1983 claims with claims for judicial review pursuant to the AAA, in addition to exhausting administrative remedies. *May v. Blinzinger*, 460 N.E.2d 546 (Ind. App. 1984). Both the judicial review and §1983 claims must be filed within fifteen days of final agency action or the right to review is lost. *Id.*

[2] Clark's claim for damages could only have been made under §1983 because damages are unavailable under the AAA. Ind. Code §4-22-1-18.

[3] Ind. Code §34-4-16.5-6 provides that "a claim against the state is barred unless notice is filed with the attorney general and the state agency involved within one hundred eighty (180) days after the loss

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After Clark filed suit, the welfare department agreed on July 22, 1982 to grant Clark's request for dentures. In fact, other than filing a general denial to Clark's complaint, the welfare department has never taken any steps to dispute that it violated Clark's rights under the United States Constitution and the federal Medicaid statute when it initially refused to approve payment for Clark's dentures. The welfare department and Smith argued, however, that Clark was not entitled to pursue her claim for damages under §1983 because she had not complied with the tort claims act remedy.

On March 13, 1984, the trial court entered an Order and Decision which found that the welfare department and Smith had violated Clark's constitutional and federal statutory rights. The trial court further held that Clark's claim for damages under §1983 was not barred by her failure to pursue relief under the tort claims act prior to filing suit. On July 22, 1984, after a hearing on damages, the trial court awarded Clark damages in the amount of One Thousand Dollars ($1,000.00). The welfare department appealed.

On May 30, 1985, the Indiana Court of Appeals, First District, reversed the damage award. The court held that the Indiana Tort Claims Act administrative remedies applied to §1983 claims filed in state court and that Clark's damage claim was barred by her failure to utilize that

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occurs." The statement of the claim shall include "the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing the notice." Ind. Code §34-4-16.5-10. The agency must act upon the claim within ninety days. *Id.* No suit may be initiated until such time as the claim has been denied in whole or in part. Ind. Code §34-4-16.5-12.

remedy prior to filing suit. The Court of Appeals relied on two previous Indiana decisions requiring exhaustion of administrative remedies in §1983 cases.[4] The Court of Appeals denied Clark's petition for rehearing without opinion on July 10, 1985. On December 19, 1985, the Indiana Supreme Court heard oral argument on several issues, including whether the holding in *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), that exhaustion of state administrative remedies is not a prerequisite to filing a §1983 action, applies equaliy in state and federal court. On December 20, 1985, the court denied transfer without opinion by a three to two vote.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS DIRECTLY WITH THE DECISIONS OF OTHER STATE APPELLATE COURTS.

The Indiana Court of Appeals' decision in this case conflicts directly with decisions of the highest courts in four other states — California, Connecticut, Rhode Island, and Idaho — each of which has rejected exhaustion of state administrative remedies as a prerequisite to filing §1983 litigation in state court. In two of these cases, *Williams v. Horvath*, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976) and *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982), the plaintiffs, like petitioner Clark, had failed to avail themselves of state administrative remedies set out in "tort claims" statutes by failing to file tort claim notices. The other two cases involved statutory administrative procedures other than those contained in a state tort claims

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[4] *May v. Blinzinger*, 460 N.E.2d 546 (Ind. App. 1984); *Thompson v. Medical Licensing Board*, 180 Ind. App. 333, 389 N.E.2d 43 (1979), *rehearing denied*, 180 Ind. App. 347, 398 N.E.2d 679 (1979), *transfer denied*, (1980), *cert. denied*, 449 U.S. 937 (1980).

act. Because the exhaustion issue over which these state appellate courts disagree is one of national importance, resolution of the issue by this Court is necessary to remedy the conflict, confusion and uncertainty surrounding the issue.

In *Fetterman v. University of Connecticut*, 192 Conn. 539, 473 A.2d 1176 (1984), the Supreme Court of Connecticut relied on *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) to conclude that exhaustion of state administrative remedies could not be required as a prerequisite to bringing a §1983 action in state court. The *Fetterman* court specifically rejected the argument that the *Patsy* holding was limited to §1983 litigation filed in federal court. Such a limited interpretation of *Patsy* led to the "incongruous result" of forcing a state court plaintiff with a civil rights claim to exhaust administrative remedies which were not a prerequisite to filing the same claim in federal court. 473 A.2d at 1181. Similarly, in *O'Connors v. Helfgott*, ___ R.I. ___, 481 A.2d 388 (1984), the Supreme Court of Rhode Island held that following *Patsy*, state court §1983 litigants could not be forced to delay vindication of constitutional rights pending exhaustion of available state administrative remedies.

In *Williams v. Horvath*, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976), a case predating *Patsy*, the Supreme Court of California held that a state remedy of recourse to the California Tort Claims Act could not be imposed upon state court §1983 litigants without running afoul of the Supremacy Clause. U.S. Const. art. VI. The court noted that the intent of the tort claims act, unlike the intent of §1983, was not to expand the rights of civil rights plaintiffs but instead to limit governmental liability. Thus, by imposing recourse to tort claims act remedies upon prospective litigants, the state was erecting a "substantive impediment" to vindication of federally protected rights. *Id.* at 1130. The court reasoned that a state statute which conditioned the right to sue the sovereign upon the timely

filing of notices and the corresponding exhaustion of state remedies was more than a procedural requirement, and was instead a substantive limitation couched in procedural language which could not be permitted to frustrate the intent of federal legislation. Similarly, in *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982), the Supreme Court of Idaho held that the administrative dispute-resolution procedures of the Idaho Tort Claims Act were inapplicable to a cause of action brought under §1983, even though failure to file the notice of claim barred the plaintiff's state law claims.

At least one intermediate state appellate court has rejected the notion that state court §1983 litigants must exhaust tort claims act administrative remedies. Relying on *Martinez v. California*, 444 U.S. 277 (1980), the Colorado Court of Appeals held that the plaintiff's §1983 claim was not barred by her failure to comply with the state tort claims act procedures. *Mucci v. Falcon School District*, ___ Colo. App. ___, 655 P.2d 422 (1982).

Although the *Fetterman* and *O'Connors* decisions do not involve state tort claims statutes, the reasoning of those decisions is in direct conflict with the reasoning of the Indiana Court of Appeals. While not specifically mentioning *Patsy*, the Indiana Court of Appeals analyzed the Indiana Tort Claims Act procedures as administrative remedies and relied on earlier Indiana cases which had imposed an exhaustion of administrative remedies requirement on §1983 state court litigants.[5] Tort claims statutes are logically treated as administrative remedies.

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[5] The court stated:

> Because it is a procedural precondition to sue it [the tort claims act] overrides the procedural framework of §1983 when the litigant chooses a state court forum. *May v. Blinzinger*, (1984) Ind. App., 460 N.E.2d 546, *trans. denied* (failure to exhaust state administrative remedies bars §1983 action in state court);

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As noted by the *Overman* court, a tort claims act "serves the purpose of providing an opportunity for parties to resolve their dispute through settlement without resort to the courts, allowing authorities to conduct a timely investigation of the claimant's cause of action to determine the extent of the state's liabilities, if any, and allowing the state to prepare its defenses." 654 P.2d at 890. Dispute resolution is the generally accepted purpose of state administrative remedies. *Patsy*, 457 U.S. at 516-517 (O'Connor, J., concurring). Thus, the approach to analyzing the imposition of tort claims act remedies on §1983 litigants should be the same as the approach to analyzing the imposition of any other administrative remedy.

The Indiana Court of Appeals' decision is not an isolated aberration in what should be a uniformly recognized rule prohibiting imposition of an exhaustion requirement on state court §1983 litigants. Other courts, in direct conflict with the *Fetterman*, *O'Connors*, *Williams*, and *Overman* decisions, have limited *Patsy* to suits brought in federal court and expressly required state court §1983 litigants to exhaust state administrative procedures. *See Kramer v. Horton*, No. 84-762 (Wis. 1986) (Appendix at A-13); *Mills v. Monroe*, 59 N.Y.2d 309, 464 N.Y.S.2d 709 (1983) (specifically involving county tort claims remedy); *Caylor v. City of Red Bluff*, No. 20852 (Cal. Ct. App. 1985), *review denied*, (1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 605 (1985). Several other state supreme and intermediate level courts have created *ad hoc* rules requiring exhaustion in particular cases, depending on the kind of federal claim

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Thompson v. Medical Licensing Board (1979), 180 Ind. App. 333, 398 N.E.2d 679 [sic] *cert. denied* 449 U.S. 937, 101 S.Ct. 335, 66 L.Ed.2d 160 (same); *cf. Monroe v. Pape* (1961), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (exhaustion of state administrative remedies not a precondition to suing under §1983 in federal court).

478 N.E.2d at 702.

involved and the strength of the plaintiff's case. *See Snuggs v. Stanly County Department of Public Health*, 310 N.C. 736, 314 S.E.2d 528 (1984) (exhaustion of administrative remedies required in absence of specific showing that state remedies are inadequate); *Bartschi v. Chico Community Memorial Hospital*, 137 Cal.App.3d 502, 187 Cal. Rptr. 61 (1982) (*Patsy* does not require application of a no exhaustion rule where plaintiff's civil rights claim was "tenuous"); *San Jose Teachers Association v. Superior Court*, 38 Cal.3d 839, 215 Cal. Rptr. 250, 700 P.2d 1252 (1985) (requiring exhaustion in cases brought to obtain refunds of union "service fees"); *State Tax Commission v. Fondren*, 387 So. 2d 712 (Miss. 1980) (recognizing general "no exhaustion" rule, but requiring exhaustion in tax cases), *cert. denied sub nom. Redd v. Lambert*, 450 U.S. 1040 (1981). Furthermore, the decision below is not an isolated aberration in Indiana, but is reflective of well established case law. *See State ex rel. Basham v. Medical Licensing Board*, 451 N.E.2d 691 (Ind. App. 1983) (limiting *Patsy* holding to suits brought in federal court).

The decision of the Indiana Court of Appeals contributes to the already irreconcilable conflict existing among the states regarding one of the most important and hotly litigated issues currently involving §1983; that is, whether a state may impose an exhaustion of administrative remedies requirement that would be impermissible were the case litigated in federal court. The importance of the question and the conflict among the states on this issue justify the grant of certiorari to review the decision below.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS DIRECTLY WITH ONE DECISION OF THIS COURT AND IN PRINCIPLE WITH SEVERAL OTHERS.

The decision of the Indiana Court of Appeals barring petitioner's §1983 claim for failure to comply with the Indiana Tort Claims Act notice provision is in direct

conflict with this Court's decision in *El Paso & Northeastern Railway Co. v Gutierrez*, 215 U.S. 87 (1909). In addition, the Court of Appeals' decision conflicts with the principles established by a body of case law from this Court addressing the obligation of state courts entertaining federal claims to apply all federal policies that are an integral part of the federal claim.

In *Gutierrez*, a widow filed a claim against a railroad in state court under the Federal Employers' Liability Act of 1906 (FELA) for damages arising out of the death of her husband. The railroad's sole defense was that the plaintiff had failed to comply with a territorial notice of claim statute almost identical to the notice of claim provision of the Indiana Tort Claims Act. The Court relied on the principle that "an act of Congress undertaking to regulate commerce in the District of Columbia and the territories of the United States would necessarily supersede the territorial law regulating the same subject," *Id.* at 93, to hold that the widow's failure to comply with the notice of claim statute did not bar her from litigating her federal claim in state court. Because the facts of the case at bar are so similar to those in *Gutierrez*, and because subsequent cases from this Court have reaffirmed the principle underlying *Gutierrez*, the decision below should be reviewed.

Since *Patsy* established, as a matter of federal law, that exhaustion of administrative remedies is not a prerequisite to filing a §1983 suit, this Court has not had occasion to decide whether that principle applies in state as well as in federal court. Over the past sixty years, however, this Court has repeatedly required state courts hearing federal claims to hear the full federal cause of action and to refrain from applying state policies and procedures which conflict with, undermine, or in any way impair the federal claim. Thus, a state court decision to impose an exhaustion of administrative remedies requirement on §1983 litigation conflicts with the principles reiterated by this Court regarding the litigation of federal claims in state courts.

In *Davis v. Wechsler*, 263 U.S. 22 (1923), a decision arising out of an action involving railroads under federal control during World War I, this Court ruled that state practice with respect to venue could not defeat the assertion of the federal right, noting that "whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." 263 U.S. at 24. Similarly, in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), this Court held that a state court, in an action for the enforcement of rights under the federal Merchant Marine Act, could not follow state law imposing on plaintiffs the burden of invalidating a release of liability because it altered rights established under the federal statute. The federal statute placed the burden of proving the validity of a release upon the ship owner. The fact that the state had voluntarily opened its courts to the federal cause of action was enough to require it to give petitioner "the benefit of the full scope of these [federally created] rights;" even though the state classified the rule in question as procedural, this did not give the state authority to reject a policy that "inhered" in the cause of action. 317 U.S. at 249.

Again, in *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949), this Court indicated its willingness to reject particular state practices which unnecessarily burden rights arising under federal law. In that case, a strict state pleading rule resulted in the dismissal of the plaintiff's FELA complaint. The Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts." *Id.* at 295. Noting that "this federal right cannot be defeated by the forms of local practice," the Court reversed the dismissal. *Id.*

The type of analysis reflected in *Davis*, *Garrett* and *Brown* has also been applied by this Court to §1983 actions

arising in state court, although the precise issue of exhaustion of state administrative remedies prior to suing in state court has not yet been addressed. In *Martinez v. California*, 444 U.S. 277 (1980), this Court refused to allow a state immunity statute to be used as a defense to a §1983 claim, even though the federal cause of action was being asserted in a state court. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court again took the opportunity to clarify that policies applicable to §1983 generally were applicable whether the claims were brought in federal or state court. In *Thiboutot*, this Court held that the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988, applied equally to federal and state court litigation despite the fact that the Fees Act does not specifically authorize state courts to award fees. In reaching this conclusion, the Court relied on the Fees Act and its legislative history, including the characterization of the fee provision as an "integral" part of the §1983 remedy. *Id.* at 11.

The "no exhaustion" rule for §1983 litigation established in *Patsy* is as much an "integral" part of the federal cause of action as is the fee provision addressed in *Thiboutot* and the immunity defense limitation addressed in *Martinez*. Although *Patsy* arose in federal court, the holding that "exhaustion of state administrative remedies should not be required as a prerequisite for bringing an action pursuant to §1983"[6] is neither expressly limited to actions commenced in federal court nor is it implicitly limited by the underlying rationale of the case. The *Patsy* holding relies primarily on what was determined to be the intent of Congress: "[T]he initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." 457 U.S. at 501-502. The *Patsy* Court

[6] 457 U.S. at 516.

found that providing individuals who were threatened with or had suffered deprivation of constitutional rights immediate access to court was the overriding intent of the 1871 Congress. The practice of identifying and relying on the intent of Congress applies to federal actions being brought in state court, as well as those initiated in federal forums, because the Supremacy Clause prevents a state court from using state rules of procedure to frustrate congressional policies. *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952). Furthermore, when Congress enacted §1983, "many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Patsy*, 457 U.S. at 506. Thus, when a state court refuses to rule on a §1983 case pending the exhaustion of administrative remedies, it delays access to court and thereby frustrates the intent of Congress that both the state and federal courts be immediately available to consider constitutional or federal statutory claims.

Indiana's imposition of an exhaustion of administrative remedies requirement on state court §1983 litigants is as much a part of its substantive law as were the immunity provisions of the California Tort Claims Act rejected in *Martinez*. Policies regarding exhaustion are not mere housekeeping rules, but are instead "intimately bound up" with substantive rights and obligations. *DiAntonio v. Northampton-Accomack Memorial Hospital*, 628 F.2d 287, 290 (4th Cir. 1980). For this reason, this Court has required plaintiffs in diversity actions to abide by applicable state exhaustion requirements before filing suit in federal court. *Transcontinental & Western Air v. Koppal*, 345 U.S. 653, 661-662 (1953). The courts of appeals have reached similar results. *White v. Lavigne*, 741 F.2d 229 (8th Cir. 1984); *Sandhill Motors, Inc., v. American Motors Sales Corp.*, 667 F.2d 1112 (4th Cir. 1981). Because exhaustion requirements are so fundamentally related to the progress

of the federal claim, a state court hearing a federal claim under §1983 can no more impose an exhaustion requirement than a federal court considering a diversity case can ignore state laws requiring resort to administrative agencies before filing suit.

By subjugating federal claims to the particularities of Indiana policies and procedures, the Indiana Court of Appeals has rejected principles that this Court has established regarding the obligation of state courts to apply federal policies that are an inherent part of federal claims. Indiana's flagrant rejection of federal law is epitomized by the decision in the case of *Thompson v. Medical Licensing Board*, 180 Ind. App. 333, 389 N.E.2d 43 (1979), *rehearing denied*, 180 Ind. App. 347, 398 N.E.2d 679 (1979), *transfer denied*, (1980), *cert. denied*, 449 U.S. 937 (1980), which is relied upon by the Court of Appeals in its decision in the case at bar. The Indiana Court of Appeals, in rejecting the federal "no exhaustion" rule for §1983 claims goes so far as to say:

> No case cited by Thompson, nor any which we have been able to locate, demands that a state court abandon its own requirements of exhaustion merely because the claim before it is based upon §1983...[A] state court does not undergo a metamorphosis into a federal court merely because it must decide a §1983 suit. No matter what the nature of the action before an Indiana state court, it remains a state court. As Gertrude Stein observed, a "rose is a rose is a rose is a rose." Our rules of trial procedure and evidence still apply. So does our requirement of exhaustion.
>
> If Thompson desired the benefit of federal procedures, he should have brought his suit in federal court.

Id. at 680. Unless this Court grants the writ of certiorari, Indiana will continue to apply state policies to subvert federal claims, in spite of the fact that the state policies conflict with policies inherent in the federal cause of action.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW RAISES IMPORTANT ISSUES IMPLICATING ESTABLISHED PRINCIPLES OF FEDERALISM.

The decision of the Indiana Court of Appeals, if permitted to stand, encourages the adoption by state courts of policies, such as the exhaustion of administrative remedies rule, which are inhospitable to would-be state court civil rights litigants. Thus, states, like Indiana, effectively force §1983 litigants, like petitioner, to turn to the already over-burdened federal court system to litigate civil rights claims which could otherwise be adjudicated in state court.

In *Maine v. Thiboutot*, Justice Brennan, writing for the majority, noted that "[i]f fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts." 448 U.S. at 11 n.12. Similarly, if the *Patsy* "no exhaustion" rule was inapplicable in state court, federalism concerns would be raised because plaintiffs desirous of prompt judicial attention would have no choice but to litigate their §1983 claims in federal court.

In fact, petitioner's experience attempting to litigate her §1983 claim in state court is a prime example of why other §1983 claimants would be discouraged from attempting litigation in an Indiana state court. Petitioner spent nine months, from November, 1980 until August, 1981, exhausting the administrative remedies of the welfare department following the initial denial of Medicaid payment for dentures. During these nine months, petitioner suffered the daily humiliation, inconvenience and discomfort normally associated with needing dentures. In addition, the Indiana Court of Appeals has imposed on the prospective §1983 litigant a second, time-consuming administrative procedure, further delaying access to a judicial forum. Under the tort claims act procedures, the

welfare department is entitled to an additional ninety days to reconsider its position following notice by the prospective plaintiff of the damage claim. During this lengthy period of time there is no judicial recourse available to the injured party other than pursuing the claim in the readily available federal forum.

Justice Powell, in his dissenting opinion in *Patsy*, stressed the unprecedented increase in civil rights litigation which has confronted the federal courts over the past twenty years. He noted that "[i]n 1961, the year that *Monroe v. Pape* . . . was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U.S. Courts 238 (1961). In 1981, over 30,000 such suits were commenced. Annual Report of the Director of the Administrative Office of the U.S. Courts 63, 68 (1981)." 457 U.S. at 533. While similar figures regarding state court §1983 filings are not available, one commentator documented the rapid increase in the volume of state court §1983 cases by conducting a Lexis search of all reported state appellate court opinions between 1969 and 1983 which cited 42 U.S.C. §1933.[7] Noting that reported appellate decisions represent only a fraction of the §1983 state court caseload, he was nevertheless able to demonstrate a dramatic increase over the period of fourteen years.

Not only does the imposition of a state court exhaustion requirement encourage prospective §1983 litigants to file their claims in federal court, but it also belies significant assumptions regarding the legitimacy and reliability of state courts adjudicating federal claims. In abstention cases, for example, this Court has routinely relied on notions of "comity" and "federalism" as a basis for

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[7] Steinglass, *The Emerging State Court §1983 Action: A Procedural Review*, 38 University of Miami Law Review 381, 435 n. 269.

protecting state courts from federal interference. As noted by this Court, "state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States. . .'" *Steffel v. Thompson*, 415 U.S. 452 at 460-461 (1974) (*quoting Robb v. Connolly*, 111 U.S. 624, 637 (1884)). By imposing an exhaustion of administrative remedies requirement on state court §1983 litigants, Indiana has shown a remarkable insensitivity to this "solemn responsibility." If federalism is to remain a truly viable concept, litigants wishing to pursue federal claims in state court must be confident that the state court will apply the federal policies inherent in the federal claims and will not be permitted to pick and choose among their attributes.

With the increasing number of §1983 cases filed in both federal and state court, and the increasing concern over the crowded federal docket, it is simply illogical to permit states to fly in the face of consistent analysis by this Court by continuing to create state judicial environments that are hostile to the litigation of federal claims. Consequently, this Court should grant the writ in order to reaffirm the responsibility of state courts under this scheme of federalism to fully protect federal rights.

CONCLUSION

The decision below is in direct conflict with the decision of the highest courts of several states regarding whether the holding in *Patsy v. Board of Regents of State of Florida* is applicable in both state and federal court. In addition, the decision below conflicts with this Court's holding in *El Paso & Northeastern Railway Co. v. Gutierrez* and with the doctrines established by this Court regarding the obligations of state courts entertaining federal claims. Finally, the decision below implicates established principles of federalism by creating a hostile state court environment for the litigation of federal claims, forcing would-be state court litigants into the more hospitable federal forum. For the reasons stated above, petitioner's request for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1986

Appendix

INDIANA DEPARTMENT OF PUBLIC WELFARE, and Robert F. Smith, Individually and as Acting Director of the Indiana Department of Public Welfare, Appellants,

v.

Nannie CLARK, Appellee.

No. 1-1184A285.

Court of Appeals of Indiana, First District.

May 30, 1985.

Rehearing Denied July 10, 1985.

Civil Rights Act suit was brought against the Department of Public Welfare and its acting director seeking money damages for alleged wrongful denial of medical assistance recipient's request for prior approval of payment for partial dentures. The Monroe Superior Court, Kenneth G. Todd, J., rendered summary judgment for recipient and Department appealed. The Court of Appeals, Ratliff, P.J., held that: (1) Indiana Tort Claims Act applies to state court action under federal Civil Rights Act of 1861; (2) the 180-day notice provision is not a statute of limitations and applies in state court actions under the federal Act; (3) legal memoranda submitted in conjunction with administrative proceedings did not satisfy the notice requirement; (4) the civil rights complaint did not satisfy the notice provisions; and (5) it was not abuse of discretion to permit Department to amend its answer to include defense of failure to comply with the notice provision.

Judgment reversed.

1. Civil Rights — 13.8(2)
States — 112(2)

Indiana Tort Claims Act applies to actions brought in state court seeking relief under federal Civil Rights Act of

1861 and ITCA applied to Civil Rights Act suit seeking compensatory damages for injuries sustained throughout period of alleged wrongful denial of plaintiff's request of Department of Public Welfare for prior approval for payment for partial dentures; declining to follow *Luker v. Nelson*, 341 F.Supp. 111. IC 34-4-16.5-1 to 34-4-16.5-19 (1982 Ed.); 42 U.S.C.A. §1983.

2. States — 198

Requirement of Indiana Tort Claims Act that plaintiff file notice of claim within 180 days from date of loss applies to actions brought in state courts under federal Civil Rights Act of 1861; the 180-day notice provision is not a statute of limitation but is a procedural precedent which must be fulfilled before filing suit in state court and overrides the procedural framework of the federal Act when a litigant chooses a state court forum; disagreeing with *Bell v. Metropolitan School District of Shakamak*, 582 F.Supp. 3. IC 34-4-16.5-6 (1982 Ed.); 42 U.S.C.A. §1983.

3. States — 177

"Substantial compliance" with notice requirements of Tort Claims Act requires that the purpose of the notice requirement be served and that the claimant comply with his affirmative duty of delivering some writing to the agency. IC 34-4-16.5-6 (1982 Ed.)

See publication Words and Phrases for other judicial constructions and definitions.

4. States — 177

Damages are not available under Administrative Adjudication Act and, hence, legal memoranda which plaintiff submitted in conjunction with administrative proceedings did not constitute substantial compliance with notice requirements of Indiana Tort Claims Act. IC 34-4-16.5-6 (1982 Ed.).

5. States — 197

Purpose of notice requirement of Tort Claims Act is to

inform the state agency of the circumstances surrounding the incident so it can investigate, determine a possible liability and prepare a defense. IC 34-4-16.5-6 (1982 Ed.).

6. States — 177

Civil Rights Act complaint did not satisfy notice requirement of Indiana Tort Claims Act; declining to follow *Rio v. Edward Hospital*, 104 Ill.2d 354, 84 Ill.Dec. 461, 472 N.E.2d 421; *Dunbar v. Reiser*, 64 Ill.2d 230, 1 Ill.Dec. 89, 356 N.E.2d 89. IC 34-4-16.5-6 (1982 Ed.); 42 U.S.C.A. §1983.

7. Pleading — 236(7)

Granting of motion to amend the pleading to add an affirmative defense is within the trial court's discretion.

8. Appeal and Error — 959(4)

Grant of motion to amend pleading to add an affirmative defense is reviewed for abuse of discretion.

9. Pleading — 236(7)

It was not abuse of discretion to permit Department of Public Welfare to amend answer to include defense of failure to comply with notice requirements of Indiana Tort Claims Act, notwithstanding that if Department had raised the affirmative defense in its original answer the plaintiff could have filed her notice of claim because the 180-day time limit had not then run. IC 34-4-16.5-6 (1982 Ed.).

Linley E. Pearson, Atty. Gen., Gordon E. White, Deputy Atty. Gen., Indianapolis, for appellants.

Jamie L. Weinberg, Susan A. Failey, Legal Services Organization of Indiana, Inc., Bloomington, for appellee.

RATLIFF, Presiding Judge.

STATEMENT OF THE CASE

The Indiana Department of Public Welfare (Department) appeals the trial court's granting of summary judgment in favor of Nannie Clark (Clark) for the Department's unconstitutional denial of Clark's request for medicaid payments. We reverse.

FACTS

On November 19, 1980, Clark submitted a request by her dentist to the Department to obtain prior approval for payment for partial dentures. The Department denied the request on November 26, 1980. From this denial, Clark pursued her administrative remedies. A hearing was held before a Department hearing officer who upheld the denial of Clark's request. Clark appealed this decision to the State Board of Public Welfare (Board). On August 24, 1981, the Board notified Clark that it affirmed the denial of prior payment.

On September 9, 1981, Clark filed a complaint consisting of two counts in Monroe Superior Court. The first count requested judicial review, pursuant to the Indiana Administrative Adjudication Act (AAA), of the Board's decision. The second count alleged the Department and Robert Smith in his official capacity as the Department's director, violated, *inter alia*, Clark's equal protection and due process rights guaranteed by the fourteenth amendment to the U.S. Constitution. This count sought relief pursuant to 42 U.S.C. §1983 in the form of compensatory damages for injuries sustained throughout the period of the alleged wrongful denial of her request for dentures.

The trial court, on discovering that the tape of the administrative hearing had been erased before transcription, remanded the case for another hearing. The trial court, however, retained jurisdiction. At the rehearing, the Department reversed itself. It agreed that

Clark's request for prior payment should be granted and issued its new decision on July 22, 1982.

Clark then pursued her claim for damages under §1983. She filed a motion for summary judgment. The trial court granted Clark's motion and awarded her $1,000 in damages. The Department appeals.

ISSUE

Due to our decision we address only the single issue of whether the Indiana Tort Claims Act (ITCA) (Indiana Code sections 34-4-16.5-1 to 34-4-16.5-19) applies to Clark's §1983 action.

DISCUSSION AND DECISION

[1] To determine whether the ITCA applies to Clark's §1983 action we must determine the scope of the act. Ind.Code §34-4-16.5-1 states that the ITCA applies to suits or claims in tort. Therefore, the initial inquiry involves characterization of the nature of Clark's claim.

Clark argues that as a matter of state law, the ITCA was not intended to apply to §1983 actions. In *Luker v. Nelson* (N.D.Ill. 1972) 341 F.Supp. 111, the federal district court interpreted the Illinois Governmental Immunity Act holding it did not apply to a §1983 action. The court reviewed the statute and a number of Illinois court interpretations and reasoned that the act was intended to apply only to traditional common law torts committed by public officials. This decision has led Illinois state courts to adopt the general rule that the act does not apply to §1983 actions brought in the state court. *Firestone v. Fritz* (1983) 119 Ill.App.3d 685, 75 Ill.Dec. 83, 456 N.E.2d 904.

If the interpretations of the ITCA by Indiana courts likewise supported the ITCA's application to traditional common law torts only, we would be inclined to adopt the Illinois analysis. However, no basis in state law exists to support such a distinction. In fact, in addition to actions

involving common law torts our courts have required compliance with the ITCA in actions involving statutorily created rights; most notably in wrongful death actions. *See e.g., Scott County v. Stamper* (1981), Ind.App., 425 N.E.2d 264, *trans. denied* (180 day notice provision applied in wrongful death action against political subdivision); *Speidel v. State* (1979), Ind.App., 386 N.E.2d 180, *trans. denied* (Ind.Code §34-4-16.5-17 applies in wrongful death actions). Moreover, in *City of Terre Haute v. Brighton* (1983), Ind.App., 450 N.E.2d 1039, *trans. denied*, a §1983 claim was brought against the city by certain firemen and the city argued the suit was precluded because of the plaintiff's failure to comply with the ITCA notice requirement. This court's holding that the ITCA was inapplicable was not based on a general rule that §1983 suits are outside the scope of the act. Rather, our decision was restricted to the facts of the case which revealed the suit was not in tort but rather contractual in nature.[1] Therefore, we are not persuaded that the ITCA is inapplicable to §1983 actions brought in state court.

Next, Clark argues that as a matter of federal law, §1983 cases should not be characterized as torts. *Movement for Opportunity v. General Motors* (7th Cir. 1980), 622 F.2d 1235, 1242. This precise issue was addressed by the supreme court in *Wilson v. Garcia* (1985), ___ U.S. ___, 105 S.Ct. 1938, 85 L.Ed.2d 254. The Court held that §1983 suits are most properly characterized as torts. "Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury . . ." *Id.* ___ U.S. at ___, 105 S.Ct. at 1948. Therefore, Clark's §1983 action is a suit in tort and consequently the ITCA applies.

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[1] The supreme court's recent decision in *Wilson v. Garcia* (1985), ___ U.S. ___, 105 S.Ct. 1938, 85 L.Ed.2d 254, casts doubt on the validity of the characterization of the underlying action in *Brighton* as contractual in nature.

The threshold requirement of the ITCA is that the plaintiff file a notice of claim with the state agency and attorney general within 180 days from the date of the loss. Ind.Code §34-4-16.5-6. No formal notice was ever served by Clark. Therefore, unless she is exempt from the notice requirement, her suit is barred. *Poole v. Clase* (1985), Ind., 476 N.E.2d 828.

[2] Clark argues that the ITCA notice provision is inapplicable to §1983 actions because it is contrary to federal policy. In *Bell v. Metropolitan School District of Shakamak* (S.D.Ind. 1983), 582 F.Supp. 3, the question was which Indiana statute of limitations should apply in §1983 actions. The court rejected the 180 day notice provision and held the two year tort statute in Indiana Code section 34-1-2-2(1) should apply. *Id.* at 8. If the 180 day notice provision was actually a statute of limitation we would agree that it should not apply in §1983 actions. *Wilson*, ____ U.S. at ____-____, 105 S.Ct. at 1947-51; *Movement for Opportunity*, 622 F.2d at 124; *Hill v. Trustees of Indiana University* (7th Cir. 1976), 537 F.2d 248. However, we respectfully submit the district court in *Bell* erred by treating the notice provision as a statute of limitation. The ITCA notice provision is not a statute of limitation. *City of Fort Wayne v. Cameron* (1977), 267 Ind. 329, 370 N.E.2d 338. Rather, it is a procedural precedent which must be fulfilled before filing suit in a state court. *Thompson v. City of Aurora* (1975), 263 Ind. 187, 325 N.E.2d 839. Because it is a procedural precondition to sue, it overrides the procedural framework of §1983 when the litigant chooses a state court forum. *May v. Blinzinger* (1984), Ind.App., 460 N.E.2d 546, *trans. denied* (failure to exhaust state administrative remedies bars §1983 action in state court); *Thompson v. Medical Licensing Board* (1979), 180 Ind.App. 333, 398 N.E.2d 679 *cert. denied* 449 U.S. 937, 101 S.Ct. 335, 66 L.Ed.2d 160 (same); *cf. Monroe v. Pape* (1961), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (exhaustion of state administrative remedies not a precondition to suing under

§1983 in federal court). Despite the holding in *Bell* we find the 180 day notice of claim provision applies to §1983 actions brought in state court. *Mills v. County of Monroe* (1983), 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456.

[3] Clark next argues alternatively that there was substantial compliance with the notice provision. Substantial compliance requires that the purpose of the notice requirement be served and that the claimant comply with his affirmative duty of delivering some writing to the agency. *Geyer v. City of Logansport* (1977), 267 Ind. 334, 370 N.E.2d 333. Clark says these two elements were satisfied by legal memoranda she submitted in conjunction with the administrative proceedings.

[4,5] Assuming the legal memoranda were properly delivered, substantial compliance is still absent because the purpose of the notice provision was not served. The purpose of this requirement is to inform the state agency of the circumstances surrounding the incident so it can investigate, determine its possible liability and prepare a defense to the claim. *Geyer*, 267 Ind. 334, 370 N.E.2d 333. Any knowledge obtained, concerning the circumstances of Clark's injury through the administrative process did not aid the Department in determining its liability or in preparing a defense. As Clark correctly states in her brief, damages are not available under the AAA and thus the Department was never exposed to liability throughout the administrative process. Consequently, until the Department was aware it was being sued for damages under §1983 it had no reason to prepare a defense to such an action. Any information gained through the administrative process was insufficient to satisfy the purpose of the notice requirements.

[6] There is another document in the record which could have satisfied the notice requirements. Although not argued, it is necessary for us to determine whether the §1983 complaint filed by Clark satisfied the notice provision.

Whether or not a complaint, served on the proper state officials can also satisfy the ITCA notice provision has never been addressed. Under the Illinois Governmental Immunity Act notice must be served on the political subdivision within a certain period or the claimant's suit is barred. Ill. Rev.Stat.Ann. ch. 85 §8-102. The Illinois courts have held that the legislative history of this act supported allowing a complaint simultaneously to satisfy the statutory notice provision. *Rio v. Edward Hospital* (1984), 104 Ill.2d 354, 84 Ill.Dec. 461, 472 N.E.2d 421; *Dunbar v. Reiser* (1976), 64 Ill.2d 230, 1 Ill.Dec. 89, 356 N.E.2d 89. However, unlike the ITCA, a claimant may sue under the Illinois act as soon as notice is served. Before suit can be filed against a governmental entity in Indiana, the claimant must not only send a notice of claim within 180 days, but wait until the claim is denied. *See* Ind.Code §§34-4-16.5-6, 34-4-16.5-10 and 34-4-16.5-12. A New York statute has a similar waiting period before suit may be filed against a political subdivision. In *Davidson v. Bronx Municipal Hospital* (1984), 64 N.Y.2d 59, 484 N.Y.S.2d 533, 473 N.E.2d 761, the court held that the plaintiff's complaint could not also be considered the notice of claim to the municipality. Consequently, the court held timely notice was not served. *Id.*, 484 N.Y.S.2d 535, 473 N.E.2d at 763. Because the ITCA also contains a waiting period before suit can be filed, we are persuaded to follow the New York Court of Appeals' holding. Considering the entire statutory scheme of the ITCA, we believe the legislature intended the notice of claim and complaint to be two separate documents; the latter being served only after denial of the former. *Walker v. Memering* (1984), Ind.App., 471 N.E.2d 1202, 1204. Consequently, Clark's complaint may not also satisfy the notice provision. Therefore, we find nothing in the record that reveals substantial compliance with the notice provision.[2]

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[2] Since nothing in the record indicates substantial compliance with Ind.Code §34-4-16.5-6 we need not discuss the issue of timeliness of notice. Therefore, we express no opinion as to when the 180 day notice period began to run.

[7-9] Clark's final attempt to avoid being barred by her failure to file notice is her argument that the state waived the affirmative defense. The Department's original answer did not raise failure to comply with the ITCA notice provision. The Department later moved to amend their answer to include the defense. The granting of this motion is now challenged by Clark on appeal.

The granting of a motion to amend a pleading to add an affirmative defense is within the trial court's discretion. *Cox v. Indiana Subcontractors Association, Inc.* (1982), Ind.App., 441 N.E.2d 222; *Criss v. Bitzegaio* (1981), Ind., 420 N.E.2d 1221. We review the trial judge's decision by determining whether he abused his discretion resulting in prejudice to the plaintiff. *Id.* The only prejudice Clark argues she suffered is that she is now barred from pursuing her claim. She contends, if the Department had raised its affirmative defense in its original answer, she still could have filed her notice of claim because the 180 day time limit had not run. Such prejudice is not the result of the Department's amendment. Rather, it is due to Clark's failure to fulfill her affirmative duty to provide notice. Finding the amendment caused no prejudice to Clark we conclude the trial judge did not abuse his discretion.

Clark's §1983 action is barred due to her failure to comply with the ITCA notice provision.

Judgment reversed.

NEAL and ROBERTSON, JJ., concur.

Ind. Code 34-4-16.5-6 Notice to attorney general and state agency involved; requirements

Sec. 6. Except as provided in section 8 of this chapter a claim against the state is barred unless notice is filed with the attorney general and the state agency involved within one hundred eighty (180) days after the loss occurs. However, if notice to the state agency involved is filed with the wrong state agency, that error does not bar a claim if the claimant reasonably attempts to determine and serve notice on the right state agency.

Ind. Code 34-4-16.5-7 Claims against political subdivisions; notice requirement

Sec. 7. Except as provided in section 8 of this chapter a claim against a political subdivision is barred unless notice is filed with the governing body of that political subdivision within one hundred eighty (180) days after the loss occurs.

Ind. Code 34-4-16.5-8 Incompetent plaintiffs; notice requirement

Sec. 8. If a person is incompetent to give notice as required in section 6 or 7 of this chapter, his claim is barred unless notice is filed within one hundred eighty (180) days after the incompetency is removed.

Ind. Code 34-4-16.5-9 Notice requirement; form of statement

Sec. 9. The notice required by sections 6, 7, and 8 of this chapter shall describe in a short and plain statement the facts on which the claim is based. The statement shall include the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing the notice.

Ind. Code 34-4-16.5-10 Approval or denial of claim by government entity

Sec. 10. Within ninety (90) days of the filing of a claim the governmental entity shall notify the claimant in writing of its approval or denial of the claim. A claim is denied if the governmental entity fails to approve the claim in its entirety within ninety (90) days, unless the parties have reached a settlement before the expiration of that period.

Ind. Code 34-4-16.5-11 Notice requirements; service

Sec. 11. The notices required by sections 6, 7, 8, and 10 of this chapter must be in writing and must be delivered in person or by registered or certified mail.

Ind. Code 34-4-16.5-12 Denial of claim as prerequisite to suit

Sec. 12. A person may not initiate a suit against a governmental entity unless his claim has been denied in whole or in part.

Paul KRAMER, *Plaintiff-Respondent and Cross-Appellant,*

v.

Frank E. HORTON, Chancellor of the University of Wisconsin-Milwaukee, Robert C. Corrigan, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and Gerald T. McKenna, Chairman of the Department of Music of the University of Wisconsin-Milwaukee, *Defendants-Appellants and Cross-Respondents-Petitioners*

No. 84-762
Supreme Court of Wisconsin.
March 13, 1986.

LeRoy L. Dalton, Asst. Atty. Gen., argued for defendants-appellants and cross-respondents-petitioners; Bronson C. LaFollette, Atty. Gen., on brief.

Dennis L. Fisher, argued, for plaintiff-respondent and cross-appellant; Susan J. Marguet and Meissner, Tierney, Ehlinger & Whipp, S.C., Milwaukee, on brief.

Bruce Meredith, Staff Counsel, Madison, and Wisconsin Educ. Ass'n Council, for amicus curiae.

CALLOW, Justice.

The defendants, Frank Horton, Chancellor of the University of Wisconsin-Milwaukee, Robert Corrigan, Dean of the School of Fine Arts of the University of Wisconsin-Milwaukee, and Gerald McKenna, Chairman of the Department of Music of the University of Wisconsin-Milwaukee, all in an official representative capacity (University), seek review of a published decision of the court of appeals, *Kramer v. Horton*, 125 Wis.2d 177, 371 N.W.2d 801 (Ct.App. 1985). The court of appeals affirmed a judgment of the circuit court for Milwaukee county, Judge Harold B. Jackson, Jr., in which the circuit court ordered a "name-clearing" hearing for the plaintiff, Paul Kramer, a

tenured professor in the Department of Music and awarded him $38,654.17 for attorney fees, expenses, and disbursements, under 42 U.S.C. §1988 (1976). The parties raise numerous issues on appeal, but one issue is dispositive: whether Kramer should have exhausted his administrative remedies prior to instituting this suit. Because we conclude that he should have exhausted his administrative remedies before commencing this action, we reverse the decision of the court of appeals.

In 1965 Paul Kramer, an oboist who had spent several years as a concert musician with the Boston Symphony and other orchestras, contacted the Chairman of the Department of Music at the University of Wisconsin-Milwaukee (Department) about a possible opening on the faculty for an oboist. He auditioned in the spring of 1966. The Dean of the School of Fine Arts sent him a letter of appointment later that year. The letter stated: "In addition to teaching general and applied music, your services to the university will include performing." Apparently, the Dean and Kramer had discussed the possibility of forming a woodwind quintet, composed entirely of faculty members of the Department. When Kramer accepted the appointment, the Woodwind Arts Quintet did not exist.

With the Dean's support, Kramer helped organize the Woodwind Arts Quintet (Quintet) and actively participated in recruiting members. The formation of the all-faculty Quintet was completed in October, 1970. Beginning in 1971, members of the Quintet received formal release time from a portion of their teaching responsibilities to allow them to rehearse and perform.

Kramer received tenure and became an associate professor in 1971. In 1975 he was promoted to the position of full professor in the Department. Kramer was a member of the Quintet from 1970 until 1979 when the Chairman of the Department reassigned him to full-time teaching responsibilities which denied him the opportunity to participate in the Quintet. Believing he was treated

unfairly in being reassigned, Kramer commenced this lawsuit.

Although most of the events surrounding Kramer's reassignment took place in July and August of 1979, problems within the Quintet had emerged as early as November, 1977. At a rehearsal of the Quintet in November, 1977, members of the Quintet criticized Kramer's performance at a prior concert during which he played with a cracked reed in his oboe. They discussed with Kramer their concerns about performance problems, rehearsal problems, stage mannerisms, and reed problems. They informed Kramer that his performance in the group was "unacceptable" because his playing was not up to the level it should be.

On more than one occasion between November, 1977, and July, 1979, members of the Quintet again expressed criticism of Kramer and voiced their concerns to him. Because the other members of the Quintet did not perceive any improvement on Kramer's part during this period, they became increasingly dissatisfied. Finally, in the summer of 1979, they concluded that they could not continue playing in the Quintet with Kramer.

The frustrations of the other members of the Quintet culminated in a confrontation with Kramer on July 21, 1979, when the Quintet held a meeting at which the other members of the Quintet asked Kramer to resign from his position in the Quintet. Once again the Quintet members expressed to Kramer the basis for their dissatisfaction, but they did not provide him with a written statement of reasons for his requested resignation. Kramer refused to resign.

Kramer raised objections to his proposed removal with the Chairman of the Department and with the Dean of the School of Fine Arts, but to no avail. The Chairman, who was aware of the discontent of the other members of the Quintet, explained to Kramer that he could not conceive of

a meaningful way to force a chamber music group to play with a member in whom they had no confidence. Believing it would serve the best interests of the University and the Quintet, the Chairman reassigned Kramer's time from rehearsing to teaching.

After learning of his reassignment, Kramer filed a grievance petition with the University Committee, the faculty executive committee for the entire University. The University Committee responded on August 29, 1979, informing Kramer that the Executive Committee of the Department was the appropriate forum in which to seek initial review of his reassignment. On September 4, 1979, the first day of class in the 1979-80 school year, Kramer commenced this lawsuit.

Kramer appealed his reassignment to the Executive Committee of the Department on September 7, 1979. On September 18, 1979, the Executive Committee convened a special meeting at which it reviewed the decision to reassign Kramer from rehearsing to additional teaching. Kramer did not receive a written statement of the reasons for his reassignment either prior to or at this meeting. The Executive Committee, however, did give him an opportunity to present his side of the story. He also was allowed to have counsel present, although neither he nor his counsel was permitted to call witnesses, cross-examine speakers, or introduce evidence.

On September 26 the Executive Committee issued a written report in which it affirmed that the Chairman had acted within the jurisdiction of his office in reassigning Kramer to fulltime teaching duties. According to the report, the Executive Committee found adequate support for the decision and believed the decision served the best interests of the Department.

Kramer appealed to the Chancellor in March, 1980, challenging the Executive Committee's decision on both substantive and procedural grounds. In a letter dated

October 29, 1980, the Chancellor denied Kramer's appeal. Kramer did not appeal the Chancellor's decision to the Board of Regents.

In his initial complaint, filed on September 4, 1979, Kramer claimed that the University had deprived him of his property right in the Quintet position in violation of the United States Constitution and the Wisconsin Constitution. Kramer filed an amended complaint on October 30, 1979, further alleging that the University deprived him of a property right and a liberty interest in violation of the fourteenth amendment to the Constitution. He asked for equitable relief under 42 U.S.C. §1983 and for attorney fees under 42 U.S.C. §1988. Finally, he asserted a second cause of action alleging a violation of the Wisconsin Administrative Code, UWS §6.01 (1975).

After denying the defendants' motions to dismiss and the defendants' motion for summary judgment, the circuit court held a trial in April, 1983. At trial several witnesses testified regarding damage to Kramer's reputation resulting from his removal from the Quintet. In October, 1983, the court decided that the University did not provide Kramer with due process because it did not give him an adequate hearing prior to or subsequent to his reassignment to fulitime teaching. Specifically, the court held that the University violated due process because it failed to provide Kramer with a written statement of the reasons for his reassignment and did not allow Kramer to call his own witnesses or cross-examine other witnesses.

The court entered judgment for Kramer in February, 1984, requiring that the University conduct a "name-clearing" hearing, pursuant to *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), to rectify any harm to Kramer's liberty interest. Further, the court also entered judgment against the defendants in the amount of $38,654.47 to cover Kramer's costs, including reasonable attorney fees and reimbursement of expenses and disbursements.

The University appealed the circuit court's judgment; Kramer cross-appealed claiming the circuit court should have found a property interest in addition to a liberty interest.[1] The court of appeals issued its decision in May, 1985, affirming the judgment of the circuit court.

Specifically, the court of appeals upheld the circuit court's denial of the defendants' two motions to dismiss. With regard to the defendants' assertion that Kramer failed to comply with the notice of claim statute, §895.45, Stats. 1977, the court of appeals ruled that compliance is not required on a §1983 action, citing *Perrote v. Percy*, 452 F.Supp. 604 (E.D.Wis. 1978). With regard to the defendants' assertion that Kramer failed to exhaust administrative remedies, the court similarly noted that exhaustion of administrative remedies is not mandatory in a §1983 action, citing *Castelaz v. Milwaukee*, 94 Wis.2d 513, 534-35, 289 N.W.2d 259 (1980).

On the due process question, the court of appeals affirmed the circuit court's ruling that the University deprived Kramer of a protected liberty interest without due process of law. The court of appeals also affirmed the circuit court's award of attorney fees. Finally, the court of appeals remanded the case and instructed the circuit court to determine whether Kramer had a property interest and, if so, whether the University deprived him of property without due process.

The defendants petitioned for review of the court of appeals' decision. In appealing to this court, the defendants again challenge both the lower courts denials of their motion to dismiss and the courts' substantive decisions regarding due process. In an order issued on September 10, 1985, we granted review.

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[1] The circuit court did not address the question of the University's alleged violation of the Wisconsin Administrative Code, UWS §6.01, and the issue was not raised on appeal.

The defendants claim Kramer's complaint shows that the administrative action he commenced in August, 1979, was still in progress when he filed suit on September 4, 1979. Relying upon *Nodell Investment Corp. v. Glendale*, 78 Wis.2d 416, 424, 254 N.W.2d 310 (1977), the defendants argue that, because Kramer failed to exhaust administrative remedies before filing suit, the courts erred in not dismissing his action. For further support, defendants cite *Castelaz v. Milwaukee*, *supra*, a case similar to the instant case, wherein the court stated that exhaustion of administrative remedies should be required whenever there exists an adequate administrative remedy.

Kramer initially argues that *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), controls this case. In *Patsy* the Supreme Court held that plaintiffs pursuing §1983 claims in federal court need not exhaust administrative remedies. If we decline to apply the federal rule set forth in *Patsy* and decide to apply the general rule requiring exhaustion of administrative remedies, Kramer contends that three exceptions to the general rule apply to this case. He argues that the court should not require exhaustion of administrative remedies because (1) his challenge is primarily based on the inadequacy of the administrative remedy, (2) a substantial constitutional question is involved, and (3) recourse to the administrative agency is futile. *See Castelaz*, 94 Wis.2d at 535, 289 N.W.2d 259; *Nodell Investment Corp.*, 78 Wis.2d at 425 n. 12, 254 N.W.2d 310. In the alternative, Kramer contends that he exhausted all available administrative remedies.

In deciding whether to require exhaustion of administrative remedies in this case, the court of appeals, relying upon our statements in *Castelaz*, concluded that exhaustion is not mandatory in §1983 cases. The court of appeals found that in *Castelaz* we implicitly recognized that courts should not require exhaustion in this type of case, wherein the plaintiff alleges that the available

administrative procedures are constitutionally inadequate. The court of appeals further buttressed its decision by noting that the Supreme Court in *Patsy* "concluded that exhaustion of state administrative remedies ought not be required as a prerequisite to bringing an action in federal court pursuant to §1983." *Kramer v. Horton*, 125 Wis.2d at 187, 371 N.W.2d 801.

(1,2) Applying a given rule of law to stipulated facts is a question of law. *First National Leasing Corp. v. Madison*, 81 Wis.2d 205, 208, 260 N.W.2d 251 (1977). When reviewing a question of law, this court need not defer to the lower courts' reasoning. *Milwaukee Metropolitan Sewerage District v. DNR*, 125 Wis. 2d 63, 71, 375 N.W.2d 648 (1985).

While the court of appeals was correct in noting that exhaustion is not mandatory in §1983 cases, our decision in *Catelaz* does not support the court of appeals' conclusion that a plaintiff can escape the exhaustion requirement merely by alleging that the available administrative remedies are constitutionally inadequate.

In *Nodell Investment Corp. v. Glendale, supra*, we stated the general rule that courts should deny judicial relief "until the parties have exhausted their administrative remedies; the parties must complete the administrative proceedings before they come to court." 78 Wis.2d at 424, 254 N.W.2d 310. We noted that the exhaustion rule is premised on the assumption that an administrative remedy which will protect the party's claim of right is readily available to the party on his initiative. *Id.* We also acknowledged, however, that numerous exceptions to the rule of exhaustion come into play when the reasons supporting the exhaustion rule are not present. *Id.* at 425-26, 254 N.W.2d 310.

Because the plaintiff in *Castelaz v. Milwaukee* joined a §1983 claim with state claims, *Castelaz* presented this court with an opportunity to discuss the exhaustion doctrine delineated in *Nodell Investment Corp.* in the

context of §1983 claims brought in state court. To assist our analysis we reviewed the Supreme Court decisions on exhaustion in §1983 cases brought in federal court.

We found that in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the Court applied a "no exhaustion" rule, allowing plaintiffs to pursue a §1983 claim in federal court without requiring prior exhaustion of state judicial remedies. *Castelaz*, 94 Wis.2d at 534, 289 N.W.2d 259. We noted that in subsequent decisions the Court appeared to expand the "no exhaustion" rule of Monroe to allow plaintiffs to pursue §1983 claims in federal court without requiring prior exhaustion of either state judicial remedies or state administrative remedies. *Id.; see, e.g., Gibson v. Berryhill*, 441 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973); *Houghton v. Shafer*, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319 (1968); *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963). Due to the inadequacy of the available state administrative remedies in these cases, however, exhaustion would not have been required even absent the federal "no exhaustion" rule. *Castelaz*, 94 Wis.2d at 534-36, 289 N.W.2d 259. *See* Note, *Developments in the Law — Section 1983 and Federalism*, 90 Harv.L.Rev. 1133, 1274 (1977).

We concluded, therefore, that the Court had "expressly left open the question whether the no-exhaustion rule in §1983 actions is 'invariably the case' when the administrative procedure is clear and adequate." *Castelaz*, 94 Wis.2d at 536, 289 N.W.2d 259. Accordingly, we held that state courts may require exhaustion of administrative remedies in §1983 cases in state court, essentially reaffirming our statement in *Nodell Investment Corp.* that courts should allow plaintiffs to pursue claims without requiring prior exhaustion of administrative remedies only when exceptions to the exhaustion doctrine are applicable. Because *Castelaz* failed to allege that the available procedures were inadequate or that the review

board was biased, we held that he "was required to exhaust his administrative remedies prior to seeking relief in state courts under §1983." *Id.* at 535-36, 289 N.W.2d 259.

Since our decision in *Castelaz*, the Supreme Court again has had the opportunity to discuss exhaustion of administrative remedies in the context of §1983 actions in federal court. In *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), the Supreme Court, reversing a decision of the Fifth Circuit Court of Appeals in which the fifth circuit adopted a flexible exhaustion test, stated that it had on numerous occasions, beginning with *McNeese v. Board of Education*, 373 U.S. 668, 671-73, 83 S.Ct. 1433, 1435-36, 10 L.Ed.2d 622 (1963), rejected the argument that federal courts should dismiss §1983 actions when the plaintiff fails to exhaust state administrative remedies. 457 U.S. at 500, 102 S.Ct. at 2559. While the Court acknowledged that it could have based several of its decisions on traditional exceptions to the exhaustion doctrine, it reiterated "that exhaustion is not a prerequisite to an action under §1983," and stated that it had "not deviated from that position in the 19 years since *McNeese*." *Id.* at 500-01, 102 S.Ct. at 2560. The Court also based its holding on policy grounds and on its perception of the legislative history of §1 of the Civil Rights Act of 1871, the precursor to §1983, although the Court acknowledged that "the 1871 Congress was not presented with the question of exhaustion of administrative remedies." *Id.* at 507, 102 S.Ct. at 2563.

This case presents us with the opportunity to discuss the doctrine of exhaustion in the context of §1983 claims for only the second time since our decision in *Terry v. Kolski*, 78 Wis.2d 475, 254 N.W.2d 704 (1977), in which we opened the doors of state courts to §1983 claimants by acknowledging that Wisconsin courts have concurrent jurisdiction with federal courts to hear claims brought under §1983. As we explained above, in *Castelaz v. Milwaukee*, decided two years prior to *Patsy*, we held that a plaintiff bringing a

§1983 action in state court must exhaust his administrative remedies prior to commencing his §1983 action. This case offers us an opportunity to reconsider *Castelaz* in light of the Supreme Court's ruling in *Patsy*. In deciding whether to continue to require plaintiffs to exhaust state administrative remedies prior to commencing a §1983 claim in state court, however, we need not feel constrained by the Supreme Court's ruling in *Patsy* because *Patsy* concerned a §1983 claim brought in federal court.

While the Constitution vests in Congress "the power to prescribe the basic procedural scheme under which claims may be heard in federal courts," *Patsy*, 457 U.S. at 501, 102 S.Ct. at 2560, it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court. See, U.S. Const. amend. X. Considerations of comity and federalism dictate that a state court faced with a §1983 claim must weigh different interests than a federal court when deciding whether to apply the exhaustion doctrine.

In a sense, our adherence to the exhaustion doctrine serves as a measure of our respect for the integrity of the procedural process which Wisconsin's administrative agencies afford to its citizens. With its progressive tradition, the Wisconsin legislature has afforded its citizens strong administrative protections throughout its history. This proud tradition undergirds our holding in *State ex rel. First National Bank v. M & I Peoples Bank*, 82 Wis.2d 529, 544-45, 263 N.W.2d 196 (1978), in which we discussed *Nodell Investment Corp.* and stated "that parties must exhaust administrative remedies before seeking judicial review of allegedly unconstitutional administrative agency action if the action challenged can be remedied in the administrative agency."

Indeed, the doctrine of exhaustion of administrative remedies complements our progressive tradition. It provides state agencies with the opportunity to correct their own errors and prevents premature judicial

incursions into agency activities. In addition, the doctrine of exhaustion promotes judicial efficiency. Conflicts often are resolved without resort to ligitation. Further, if a case is not resolved in the agency, the process of agency review provides the court with a greater clarification of the issues and a more complete factual record.

Further, the doctrine of exhaustion is not inherently inconsistent with the purposes of §1983. The exhaustion doctrine applies only when administrative remedies are adequate and readily available. *Nodell Investment Corp.*, 78 Wis.2d at 424, 254 N.W.2d 310. If the administrative remedies are patently inadequate, or are adequate in theory but not in practice due to bias or delay, then the basis for applying the exhaustion doctrine does not exist, and one of the exceptions should allow the plaintiff to escape from the clutches of bureaucratic tryanny. *Id.* at 425 n. 12, 254, N.W.2d 310.

Moreover, exhaustion does not foreclose access to the federal courts. Under *Patsy*, a §1983 plaintiff can elect to pursue a claim in federal court without exhausting administrative remedies. In addition, a §1983 plaintiff can pursue a claim in federal court even after exhausting state administration remedies because res judicata and collateral estoppel do not attach to state administrative agency determinations. *See*, Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U.Chi.L.Rev. 537, 551 (1974).

(3) Because we find a strong state interest in our continued adherence to the exhaustion doctrine and because we believe that requiring exhaustion of state administrative remedies is not inconsistent with the purposes of §1983, we reaffirm our holding in *Castelaz*. When state administrative remedies are adequate and readily available, a plaintiff bringing a §1983 claim in state court should exhaust his administrative remedies prior to commencing suit. Having concluded that state courts may require exhaustion of state administrative remedies as a

prerequisite to §1983 cases brought in state court, we must determine whether we should require exhaustion in this case.

As we noted in *Nodell Investment Corp.*, the exhaustion rule is premised on the notion that an adequate administrative remedy is readily available on the party's initiative. In arguing that the court should not require him to exhaust his remedies, Kramer claims that three exceptions apply to this case. First, Kramer asserts that he should not be required to exhaust administrative remedies because his action essentially challenges the constitutionality of his available administrative remedies. Second, he argues that his action raises a substantial constitutional question. Third, he contends that pursuing the available administrative remedies would be futile.

In essence, Kramer's three claimed exceptions can be distilled into one argument. Kramer contends he should not be required to exhaust his administrative remedies because exhaustion would be futile due to alleged constitutional inadequacies in the available procedures. Believing that the University denied him due process in reassigning him, Kramer brought this action on the assumption that the available University review procedures were insufficient to remedy his alleged injuries.

(4) As we noted in *State ex rel. First National Bank v. M & I Peoples Bank*, 82 Wis.2d at 545, 263 N.W.2d 196, a party "must exhaust administrative remedies before seeking judicial review of allegedly unconstitutional administrative agency action if the action challenged can be remedied in the administrative agency." To escape the exhaustion requirement, therefore, Kramer basically must prove that the administrative body either cannot or will not afford him adequate relief. Absent evidence that the reviewing agency is inherently biased, or that the agency is unable or unwilling to hear the claim, or that the agency is

delaying review unnecessarily, a plaintiff's naked assertion that available administrative remedies are inadequate is insufficient to negate the general rule requiring exhaustion of administrative remedies. *See Castelaz*, 94 Wis.2d at 535, 289 N.W.2d 259.

(5) When Kramer filed suit in this case, adequate administrative remedies were readily available to him. The Executive Committee had the power to review the circumstances surrounding the Chairman's decision to reassign Kramer, and the Chancellor had the authority to review the Executive Committee's decision. If the matter was not resolved at the institutional level, the Board of Regents had authority to review the Chancellor's decision. The University, therefore, afforded Kramer administrative procedures through which his alleged injury could be remedied.

Nonetheless, Kramer filed suit prior to exhausting these available administrative remedies. Further, when Kramer filed suit, he failed to prove that the available administrative remedies were inadequate. He offered no proof that the University was delaying review of the reassignment, was unable or unwilling to review the reassignment, or was biased in some way. We hold that none of the exceptions to the exhaustion doctrine are applicable to these facts. Kramer had an adequate administrative remedy readily available to him on his initiative. Before commencing this lawsuit, Kramer should have given the University an opportunity to correct the alleged injustices. Accordingly we reverse the decision of the court of appeals and remand to the circuit court with instructions to dismiss.

The decision of the court of appeals is reversed.

SHIRLEY S. ABRAHAMSON, J., not participating.

Supreme Court, U.S.
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NO. 85-1706 (2)

IN THE

Supreme Court of the United States

October Term, 1985

NANNIE CLARK,

Petitioner

vs.

INDIANA DEPARTMENT OF PUBLIC WELFARE
and THE DIRECTOR OF THE
INDIANA DEPARTMENT OF PUBLIC WELFARE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Must a prospective litigant file a notice of tort claim prior to filing a 42 U.S.C. §1983 action in state court.

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NO. 85-1706

IN THE

Supreme Court of the United States

October Term, 1985

NANNIE CLARK,

Petitioner

vs.

INDIANA DEPARTMENT OF PUBLIC WELFARE
and THE DIRECTOR OF THE
INDIANA DEPARTMENT OF PUBLIC WELFARE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

BRIEF OF RESPONDENTS IN OPPOSITION

The respondents, Indiana Department of Public Welfare and the Director of the Indiana Department of Public Welfare, respectfully request that this Court deny the petition for writ of certiorari to review the judgment and opinion of the Indiana Court of Appeals, reported at 478 N.E.2d 699.

STATEMENT OF THE CASE

Petitioner Clark is a Medicaid recipient. In November, 1980, she requested the welfare department to approve payment under the Medicaid program for dentures to replace her missing teeth. Her request was denied. Clark

pursued and exhausted the administrative remedies established by the welfare department. She requested an administrative hearing within thirty days of the effective date of the denial, as required by 470 Ind. Admin. Code §2-1-11. The denial of payment for dentures was sustained, following a hearing before an officer appointed by the state department of public welfare. Clark then requested review of the denial by the State Board of Public Welfare. The Board also sustained the refusal to pay for dentures. On August 24, 1981, Smith, the acting director of the welfare department, issued Clark a notice of final agency action in which he notified her that the Board had sustained the denial of payment for dentures.

On September 9, 1981, Clark filed an action in an Indiana trial court against two defendants; the state welfare department and its acting director, Smith. The first count of Clark's complaint was a petition for judicial review of the agency's decision under the Indiana Administrative Adjudication Act (AAA), Ind. Code §4-22-1-14. The second count was a complaint for damages and declaratory and injunctive relief under 42 U.S.C. §1983. Clark alleged that by denying her approval for dentures, the welfare department was violating her rights under the United States Constitution and the federal Medicaid statute. Nanny Clark did not submit a notice of tort claim to the Respondents and the Office of Attorney General pursuant to the Indiana Tort Claims Act, Ind. Code §34-4-16.5-7.

After Clark filed suit, the question of payment for Clark's dentures was remanded to the agency for another hearing. The second hearing officer ruled in favor of Clark who was then able to obtain her dentures. The welfare department and Smith still argued in the trial court, however, that Clark was not entitled to pursue her claim for damages under §1983 because, among other things, she had not complied with the notice provisions of the tort claims act.

On March 13, 1984, the trial court entered an Order and Decision which found that the welfare department and

Smith had violated Clark's constitutional and federal statutory rights. The trial court further held that Clark's claim for damages under §1983 was not barred by her failure to pursue relief under the tort claims act prior to filing suit. On July 22, 1984, after a hearing on damages, the trial court awarded Clark damages in the amount of One Thousand Dollars ($1,000.00). The welfare department appealed.

On May 30, 1985, the Indiana Court of Appeals, First District, reversed the damage award. The court held that the Indiana Tort Claims Act applied to §1983 claims filed in state court and that Clark's damage claim was barred by her failure to comply with that statute.

The Court of Appeals denied Clark's petition for rehearing without opinion on July 10, 1985.

On July 30, 1985, Nannie Clark filed a Petition for Transfer of the appellate court decision to the Indiana Supreme Court. The Petition for Transfer raised, for the first time throughout the course of the litigation, the issue of whether a plaintiff seeking relief under 42 U.S.C. §1983 in state court can be required to exhaust state administrative remedies. On December 20, 1985, the Indiana Supreme Court denied transfer without opinion by a three to two vote.

ARGUMENT

I.

CLARK'S PETITION SHOULD BE DENIED BECAUSE THIS COURT DOES NOT RENDER OPINIONS WHICH ARE ADVISORY OR BASED ON IMPROPERLY PRESENTED FEDERAL QUESTIONS

The question Clark petitions this Court to address was never properly presented to the Indiana state courts. The question Clark presents to this Court, whether state administrative remedies must be exhausted prior to filing

a §1983 action in state court, was not presented to the Indiana Court of Appeals. Clark did not raise the issue until her Petition for Transfer to the Indiana Supreme Court. Clark at that final stage of state court litigation attempted to transform her case and argue issues which were never presented to the trial court or the Indiana Court of Appeals. In her Petition for Transfer to the Indiana Supreme Court some of Clark's statements were directly contrary to the position she took in her Brief of Appellee filed with the Indiana Court of Appeals. The Indiana State Supreme Court did not pass on the question now urged and the Petition for Transfer was denied. Clark's position was not litigated in the trial court or the appellate court.

If a state supreme court gives no opinion and the judgment may have rested on a nonfederal ground this Court will not take jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). The Indiana Supreme Court will only consider constitutional questions which are first raised in the trial court. *City of Indianapolis v. Wynn* (1959), 239 Ind. 567, 582, 159 N.E.2d 572, 573. Although Clark may have argued her question before the Indiana Supreme Court, it was not properly presented to the court. As in *Stembridge*, the Indiana Supreme Court did not and could not decide the question which Nannie Clark has presented in her petition for writ of certiorari. Therefore Clark, like the petitioner in *Stembridge*, has not presented a question which is acceptable to this Court.

This Court has long recognized the importance of not rendering advisory opinions, requiring an actual case or controversy. In *United States v. Raines*, 362 U.S. 17, 21, (1960), this Court reaffirmed this position declaring:

> This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because

> irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899.

Granting Clark's petition would violate the two jurisdictional rules to which this Court has expressed rigid adherence because Clark's question is anticipatory.

Clark has clearly presented a question to this Court that is not represented by the facts of her case. The Court held in *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472 (1944), that under such circumstances it was without jurisdiction to consider the questions presented by the petitioner. *Id.* at 477. The procedural history of *McAdory* is very similar to that of Petitioner Clark's case. The petitioners in *McAdory* asserted that sections of the Bradford Act deprived them of their civil rights and conflicted with the National Labor Relations Act. *Id.* at 474. However, the contention that the Bradford Act conflicted with the National Labor Relations Act was not passed on by the Circuit Court. The issue was not presented to the Alabama Supreme Court nor did the court pass on that question. *Id.* at 477. This Court then held that, "Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to the court for decision, we are without jurisdiction to consider it in the first instance here." *Id.* at 477.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF OTHER STATE APPELLATE COURTS

Clark's question presented for review is actually two very different questions. One question is, "whether a plaintiff seeking relief under 42 U.S.C. §1983 in state court can be required to exhaust state administrative remedies." The second question is, "whether a plaintiff seeking relief under 42 U.S.C. §1983 in state court can be required to file a state tort claims notice." Clark claims the Indiana Court of Appeals considered the Indiana Tort Claims Act procedures to be an administrative remedy. The Indiana Court of Appeals concluded the notice requirement was a procedural precedent to a §1983 suit, not an administrative remedy. The court's citation to earlier Indiana cases requiring exhaustion does not imply the court considered the Indiana Tort Claims Act to be an administrative remedy. In fact, the Court had no Indiana precedent for the application of the notice provisions to §1983 litigation.

Even in the question presented to this Court, Clark fails to distinguish between an administrative remedy and a notice of tort claims act. The Indiana Tort Claims Act is not an administrative remedy. It simply requires a person to file notice of his claim with the attorney general and the state agency involved. State administrative remedies for medicaid recipients are contained in the Indiana Administrative Code. 470 Ind. Admin. Code §2-1-11. Petitioner Clark did exhaust her administrative remedies. However, she did not file the required tort claims notice.

In her Statement of the Case, Clark confuses the issue by referring to the Indiana Tort Claims Act as a remedy. The notice required by that statute is actually no more than a letter written to the attorney general's office and the state agency within 180 days of the alleged loss. Its purpose is,

"...to inform the agency of the circumstances surrounding the incident so it can investigate and determine its possible liability and prepare a defense to the claim." *Indiana Department of Public Welfare v. Clark* (1985) Ind. App., 478 N.E.2d 699, 703.

The administrative remedy afforded to Clark included notice, a fair hearing and a review of the hearing officer's decision by the state board of public welfare. It was this procedure which eventually led to Nannie Clark's receiving her dentures. Damages, however, "...are not available under the AAA and thus the Department was never exposed to liability throughout the administrative process." *Id.* at 703.

As a result of Clark's failure to distinguish between tort claim notice acts and administrative procedure acts many of the cases she presents to this court are not in conflict with the Indiana decision as she claims. A conflict cannot exist when the issues are entirely different. Clark argues that the decisions of the Supreme Court of Connecticut and the Supreme Court of Rhode Island directly conflict with the Indiana Court of Appeal's decision. However, the two cases cited by Clark, *Fetterman v. University of Connecticut*, 192 Conn. 539, 473 A.2d 1176 (1984) and *O'Connors v. Helfgott*, ___ R.I. ___, 481 A.2d 388 (1984) are both exhaustion of remedies cases; neither involved a tort claims notice act.

Two of the cases cited by Clark, do deal with state tort claims acts. In *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982) the court stated, "The notice of claim requirements of IC §6-905 are inapplicable to a cause of action under 42 U.S.C. §1983." *Id.* at 892. The ultimate decision in *Overman*, however, is not based on the notice requirements of the Idaho Tort Claims Act. The court's conclusion in that case is based on its view of granting absolute immunity to an individual acting in his capacity as a witness. The court's statement concerning the notice provisions of the tort claims act are actually no more than dicta and should not be considered as an authoritative statement by the Supreme Court of Idaho.

The decision in *Williams v. Horvath*, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976) deals squarely with the notice provisions of the California Tort Claims Act. That court refers to the notice requirement as a, "...substantive impediment in the path of a state cause of action." *Id.* at 458, 1130. The California Tort Claims Act, however, only allowed a claimant 100 days to file his notice. The Indiana Tort Claims Act allows a claimant 180 days to file his notice. Indiana allows more than two months additional time to file a claim than does California. Also, the reasoning that a notice of tort claim is a "substantive impediment" should be rejected. The effect of not filing a notice of claim can be devastating to the prospective litigant, but the requirement of simply writing what amounts to a letter to the state concerning the claim can hardly be called a substantive impediment. As this Court made clear in *Wilson v. Garcia*, ___ U.S. ___, 105 S.Ct. 1938 (1985) an abbreviated statute of limitations may not be applied to §1983 litigants. It must be kept in mind, however, that the notice provisions of the Indiana Tort Claims Act are not a statute of limitations.

III.

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT CONFLICT WITH OTHER DECISIONS OF THIS COURT

Clark's comparison of *El Paso and Northeastern Railway Co. v. Gutierrez*, 215 U.S. 87 (1909) to her case fails for two major reasons. Clark claims the territorial notice of claim statute is almost identical to the Indiana Tort Claims Act. However, if one reads the entire statute, the many critical differences are apparent. The New Mexico Territorial statute was passed due to the number of plaintiffs being injured within the Territory yet commencing suit outside the Territory. In addition the statute applied to suits against all persons and corporations, it was not limited to actions against the Territory. A claimant was required to

file a petition within 90 days or lose his cause of action entirely. The notice requirement of the New Mexico Territorial Statute placed a substantial burden on a claimant. Within three months of the loss a claimant had to submit an affidavit before an officer of the Territory. Indiana's notice requirement is not a burden. A claimant need only mail notice to the attorney general and the state agency involved. No personal appearance before an official, nor any travel is required. Also the Indiana claimant has twice as long to file the notice.

In addition, the *Gutierrez* statute had far reaching effects because of procedures available to the person allegedly responsible for the claimant's injury. This person could file a petition requiring the claimant to sue him and issue a summons for the claimant. If the claimant did not respond by filing a complaint, the court would then try the issue in the claimant's absence and issue a judgment.

Clark also attempts to equate the Indiana Tort Claims Act notice requirement with a shift in the burden of persuasion. The Indiana Tort Claims Act simply requires a party to provide notice to the attorney general and the state agency. In *Garrett v. Moore — McCormack Co.*, 317 U.S. 239 (1942) this Court held that the state law could not shift this burden to the plaintiff. Clark's comparison of her case to *Garrett* fails. The Indiana Tort Claims Act does not shift any burden to the plaintiff. A person need only submit a brief notice to the state. There is no procedural change which affects the plaintiff throughout his case as was true in *Garrett*. Clark and other persons claiming a state violation of their rights do have the benefit of the full scope of their federal rights. No policy that is "inhered" in Clark's cause of action was rejected.

Again Clark's reliance on an earlier decision by this Court is misguided. She fails to note the many and critical distinctions between *Brown v. Western Railway of*

Alabama, 338 U.S. 294 (1949) and her case. In *Brown* the issue was the application of strict local rules of code pleading to a federal right. *Id.* at 298. However, the Indiana Tort Claims Act is not a strict procedural rule which traps unwary plaintiffs. The Indiana Tort Claims Act simply requires a person to file a notice of claim within 180 days of the loss. This Court found the pleading requirements in *Brown* to be an unnecessary burden on a federal right. *Id.* The Indiana Tort Claims Act notice requirement is not an unnecessary burden because it protects important state interests. The notice requirement protects the state from the burden of defending stale or fraudulent claims.

Petitioner's reliance on *Martinez v. California*, 444 U.S. 277 (1980), *rehearing denied*, 445 U.S. 920 (1980) and *Maine v. Thiboutot*, 448 U.S. 1 (1980) is misplaced. Clark attempts to apply the specific holdings of these decisions to her case. The California immunity statute raised in *Martinez* provided a complete defense for the police officers. The Indiana Tort Claims Act does not give the state absolute immunity to a §1983 claim. The §1983 litigant need only file notice within the statutory period. Petitioner interprets the holding of *Maine v. Thiboutot* too broadly. This Court stated in *Thiboutot* that attorney fees were reasonable in §1983 actions in state and federal courts, not that all policies applicable to §1983 were applicable whether or not the claim was filed in federal or state court. *Id.* at 11. The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988, states that attorney fees may be had in any action to enforce one of the enumerated provisions. This Court noted that if §1983 litigants could not meet the $10,000 jurisdictional requirement for federal court, they would have to file their claim in state court. This would be contrary to Congressional intent as plaintiffs would still face financial disincentives in asserting their federal rights. *Id.* at 11 n.12. The Indiana Tort Claims Act is not contrary to a federal statute nor does it frustrate Congressional intent. A §1983 claimant in Indiana does not face a financial

disincentive to filing his claim in state court. *Thiboutot*, therefore, is not persuasive.

IV.

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT RAISE IMPORTANT ISSUES IMPLICATING ESTABLISHED PRINCIPALS OF FEDERALISM

Petitioner Clark repeatedly asserts that one of the most important issues concerning §1983 today is whether §1983 litigants must exhaust their administrative remedies prior to filing suit in state court. This very issue was presented to this Court in *Thompson v. Medical Licensing Board*, (1979) 180 Ind. App. 333, 389 N.E.2d 43, *rehearing denied*, 180 Ind. App. 347, 398 N.E.2d 679 (1979), *transfer denied*, (1980), *cert. denied*, 449 U.S. 937 (1980). In *Thompson* the Indiana Court of Appeals held a §1983 litigant must exhaust his administrative remedies prior to filing suit in state court. Clark claims this is a flagrant rejection of federal law. However, as the *Thompson* citation clearly indicates the decision was appealed to this Court and the writ of certiorari was denied. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982) established that §1983 litigants need not exhaust their administrative remedies prior to filing suit in federal court. Clark, in her petition, states that since *Patsy* was decided this Court has not had an opportunity to decide if the principle applies in state courts also. This is incorrect.

The California Court of Appeals held *Patsy* applied only to §1983 cases brought in federal court. The plaintiff, Caylor, filed suit in state court alleging employment discrimination. However, Caylor neglected to exhaust his administrative remedies and his §1983 claim was dismissed. The case was appealed to this court and the writ of certiorari was denied. *Caylor v. City of Red Bluff*, No. 20852 (Cal. Ct. App. 1985), *review denied*, (Cal. 1985), *cert.*

denied, ___ U.S. ___, 106 S.Ct. 605 (1985). Clark also cites *Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709 (1983), *cert. denied*, 464 U.S. 1018 (1983) a decision by the Court of Appeals of New York in her petition. Mills alleged employment discrimination by the county due to her race and national origin. She filed suit in state court alleging violation of her state and federal civil rights. The court dismissed the complaint, including her 42 U.S.C. §1981 claim, because Mills did not file a tort claims notice with the county. The court held filing notice within the 90 day statutory period was a procedural precondition to filing suit. Clark, however, neglects to remind this Court in her petition that it denied Mills' petition for writ of certiorari. At least three times this Court has had the occasion to decide if §1983 state court litigants must exhaust their administrative remedies before filing suit, one opportunity as recent as 1985. These denials are the best evidence that this Court does not find this requirement to be in conflict with the principles reiterated by it.

Petitioner's continued reliance on *Patsy* to support her position is unpersuasive. Clark claims the holding in *Patsy* is not expressly limited to actions in federal court. However, Clark fails to realize that this Court has no jurisdiction to decide constitutional questions which are broader than is necessarily required. *Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Therefore, although not expressly stated, the holding in *Patsy* is limited to federal court actions because *Patsy* was a federal case. Clark also asserts that the underlying rationale of *Patsy* is not limited to federal courts. However, a careful reading of the rationale, the intent of Congress, clearly indicates that *Patsy* is limited to cases brought in federal court.

In her petition Clark argues the intent of the 1871 Congress was to provide litigants with immediate access to court. This is only partially correct. As this Court stated in *Mitchum v. Foster*, 407 U.S. 225, 242, (1972) (quoting *Ex*

parte Virginia, 100 U.S. 339, 346, 25 L.Ed. 676 (1880)), "[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" quoted in *Patsy*, 457 U.S. at 503. Also the many remarks of the 1871 Congressional representatives all refer to providing access to federal courts. *Id.* at 503-504.

Clark maintains that the Supremacy Clause prevents state courts from utilizing state rules of procedure to frustrate Congressional policies. Requiring a §1983 state court litigant to exhaust his administrative remedies or file a notice of tort claims does not frustrate Congressional policy. The intent of the 1871 Congress was to provide access to federal courts. Indiana's requirements do not burden a person's access to federal courts or state courts. Therefore, there is no violation of the Supremacy Clause. Finally although many delegates interpreted the bill to provide concurrent state and federal forums, they did not necessarily intend the forums to be identical procedurally.

CONCLUSION

WHEREFORE, Respondents respectfully pray that this Court deny Nannie Clark's petition for writ of certiorari to the Indiana Court of Appeals, First District.

Respectfully submitted,

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No. 85-1706

IN THE

Supreme Court of the United States

October Term, 1985

NANNIE CLARK, *Petitioner,*

vs.

INDIANA DEPARTMENT OF PUBLIC WELFARE and THE DIRECTOR OF THE INDIANA DEPARTMENT OF PUBLIC WELFARE, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

THE FEDERAL QUESTION WAS PROPERLY PRESENTED TO THE INDIANA STATE COURTS

The respondents, Indiana Department of Public Welfare and its director, assert that petitioner, Nannie Clark, did not properly present the federal question in this case to the Indiana courts. The respondents ("welfare department") identify the question presented for review as: "Must a prospective litigant file a notice of tort claim prior to filing a 42 U.S.C. §1983 action in state court." Brief of Respondents in Opposition to Petition for Writ of Certiorari at i. This issue has been consistently presented and was actually decided by the Court of Appeals of Indiana. The Supreme Court of Indiana declined to review the case without comment.

The petitioner, Nannie Clark ("Clark"), prevailed at trial and was awarded damages in the amount of $1,000.[1] The welfare department itself presented the issue that is before this Court to the Court of Appeals of Indiana. "This court should adopt the position that in a §1983 claim brought in state court, the litigant must adhere to state law regarding the filing of tort actions." Brief of Appellants at 13. Clark similarly stated her view on this question to the Court of Appeals.

> The state is attempting to invoke the protection of its own immunity statute [the Indiana Tort Claims Act] against rights guaranteed by the U.S. Constitution. Because the very purpose of §1983 is to provide a remedy for state infringement of federal rights, it would be contrary to that purpose to require a state court to accept jurisdiction of a §1983 claim, and then permit it to apply its own immunity statute to bar the claims. *Martinez* [*v. California*, 444 U.S. 277 (1980)] protects the right to enforce constitutional claims in state court, free from a state's attempt to immunize itself.

Brief of Appellee at 23.

The Court of Appeals of Indiana specifically addressed and resolved this question, rejecting Clark's position.

> Clark argues that the ITCA [Indiana Tort Claims Act] notice provision is inapplicable to §1983 actions because it is contrary to federal policy. . . . Because it is a procedural precondition to sue, it overrides the procedural framework of §1983 when the litigant chooses a state court forum.

478 N.E.2d at 702. Clark's Petition for Rehearing to the Court of Appeals again clearly framed the federal question. "Specifically, Clark is asking the Court to reverse its hold-

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[1] The fact that Clark has a damage award of $1,000 at stake is itself sufficient to create an actual controversy between the parties and avoid any danger of this Court issuing an advisory opinion.

ing that her §1983 claim against the Indiana Department of Public Welfare is barred by the operation of the Indiana Tort Claims Act (ITCA)." Petition for Rehearing at 1. The welfare department agrees that the federal question was presented by Clark to the Supreme Court of Indiana.

The federal question here involves the extent to which states may burden the litigation of §1983 actions in state court, specifically through a notice of claims procedure. It is not material to the presentation of this question that the Court of Appeals of Indiana viewed the notice of claim provision as a procedural precondition to sue; whereas Clark contends that it is an impermissible burden in the nature of an exhaustion of administrative remedies requirement. The fundamental question of the limits on state imposed burdens upon §1983 litigation in state court has been precisely and consistently drawn by the parties and decided by the Indiana Court of Appeals.

This Court has required that the federal questions presented for review be properly raised in state court, but it has not required that the questions be raised in precise terms. The presentation of the federal question in this case was substantially more clear and consistent than in *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954). The issue there was whether an aircraft had attained a taxable situs within Nebraska. The Court observed that the appellant's presentation of the issue as raising a question under the Commerce Clause was erroneous and that the question presented was properly one of due process. The Court stated: "[A]ppellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." *Id.* at 599. As in *Braniff Airways*, Clark has throughout identified as the federal question in this case whether §1983 actions in state court can be

burdened with the notice of claims provisions of the Indiana Tort Claims Act.

This case is not like *Stembridge v. Georgia*, 343 U.S. 541 (1952) or *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472 (1945). In both of those cases, the federal question was not presented at all in a timely fashion to the state appellate courts. In *Stembridge*, the federal question was never mentioned until a petition for rehearing in the Court of Appeals of Georgia. Thus, when the Supreme Court of Georgia denied certiorari, it was clearly supportable by the adequate and independent state ground that the federal question had not been earlier presented. In *McAdory*, the question was never raised in or decided by the only state appellate court to consider the case, the Supreme Court of Alabama.

Neither is the welfare department's reliance upon *City of Indianapolis v. Wynn*, 239 Ind. 567, 159 N.E.2d 572 (1979) applicable. There the Supreme Court of Indiana properly rejected as untimely a new issue regarding the joinder of necessary parties to the appeal, raised for the first time on a petition for rehearing after the Supreme Court of Indiana had already disposed of the merits of the appeal.

None of these cases have application when, as here, the petitioner has urged her position on the federal question at every opportunity and when the only state appellate court to consider the question addressed it directly.

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